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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1488

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Appellant

v.

STATE OF NEW MEXICO, ET AL.,
Appellees

On Appeal from the United States District Court for the District of New Mexico

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS ON THE MERITS

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BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS ON THE MERITS

CONSENT

The International Association of Game, Fish and Conservation Commissioners (hereinafter "the Association") submits this brief amicus curiae having ob-

tained consent of all parties pursuant to Rule 42(2) of the Supreme Court Rules.

INTEREST OF AMICUS ASSOCIATION

The Association is a voluntary, unincorporated association dedicated to coordinating the efforts of public administrative agencies responsible for the protection and management of the fish and wildlife of North America. Founded at Yellowstone National Park in 1902, the Association numbers among its government members the wildlife agencies of all fifty states, five Canadian provinces, the Commonwealth of Puerto Rico, and the Republic of Mexico, as well as the U.S. Fish and Wildlife Service and the Canadian (dominion) Wildlife Service.

With the recent surge of national interest in environmental matters the Congress has been active in enacting legislation relating to fish and wildlife. For historical and policy reasons, as well as reasons rooted in the Constitution's distribution of power between the United States and the several States, Congress has been deferential to state authority and jurisdiction with respect to fish and resident wildlife. In the course thereof Congress has deliberately enacted legislation which reflects a pervasive policy of coordination between federal and state authority over wildlife, including wildlife found on federally owned lands. Thus, for example, in the National Wildlife Refuge System Administration Act of 1966, being an organic act for management of units of federal land in virtually every state set aside primarily as breeding or resting grounds for migratory waterfowl, it is provided:

> The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.

80 Stat. 927, 16 U.S.C. § 688dd(c). Similarly, in the numerous legislative enactments establishing units of the National Recreation Area System, being a federally owned system of outstanding natural areas designed primarily to meet regional recreation requirements, it is typically provided that hunting, fishing and trapping shall be permitted "in accordance with applicable laws of the United States and the respective states." E.g., § 5, 78 Stat. 1040, 16 U.S.C. § 460n-4 (Lake Mead NRA); § 6, 79 Stat. 614, 16 U.S.C. § 460o-5 (Delaware Water Gap NRA); § 4, 82 Stat. 904, 16 U.S.C. § 460w-4 (Flaming Gorge NRA). Finally, with respect to the National Forests, Congress in the Multiple Use-Sustained Yield Act of 1960 has declared its policy that "the national forests shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," adding that: "Nothing herein shall be construed as affecting the jurisdiction of the several States with respect to wildlife and fish on the national forests." § 1, 74 Stat. 215, 16 U.S.C. § 528.

The Association's interest herein is thus twofold: (1) to support congressional power in the instant case pursuant to the Property Clause of the Constitution, article IV, section 3, clause 2, to protect animals found on the public domain; and (2) to draw the Court's attention to the firmly established legal distinction

between wildlife and feral animals and the corresponding difference in the measure of State authority over wildlife and feral animals.

STATEMENT OF THE CASE

Amicus Association adopts the Statement as presented by federal appellants in their Brief on the Merits.

ARGUMENT

As Applied in the Instant Case, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (Supp. II, 1972) Is a Valid Exercise of Authority Under the Property Clause.

A. Traditional Doctrines Concerning State Authority Over Wildlife Are Not Involved in This Case.

In holding unconstitutional the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (Supp. II), the District Court held that the congressional attempt therein to regulate horses and burros on public land conflicted with historical interpretation of the Property Clause of the Constitution, article IV, section 3, clause 2, as well as traditional doctrines concerning wild animals. Relying on *Geer* v. *Connecticut,* 161 U.S. 519 (1896), and *New Mexico State Game Comm'n* v. *Udall,* 410 F.2d 1197 (10th Cir. 1969), cases enunciating the doctrine that wildlife is owned by the state in its sovereign capacity in trust for the benefit of its people, the court held that wild horses and burros do not become "property" of the United States simply by being present on its land.

The ownership doctrine enunciated in *Geer* v. *Connecticut, supra,* remains sound law. *United States* v. *Plott,* 345 F.Supp. 1229 (S.D.N.Y. 1972). As stated by Mr. Justice Frankfurter, "It expressed the momentum of legal history that preceded it, and around it in turn has clustered a voluminous body of rulings." *Toomer* v. *Witsell*, 334 U.S. 385, 408 (1948) (concurring opinion). The ownership doctrine provides authority for the States to protect natural resources other than simply fish and wildlife, see *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D.Md. 1972) (recovery of damages by state for oil spill causing pollution of state waters), and as such provides a fundamental underpinning for natural resource protection by the several states. While the *Geer* doctrine remains sound law, however, amicus submits that it is inapposite to resolution of the instant case because the burros involved herein are feral animals, not wildlife.

Through negligence or mischance, man has been responsible for the accidental introduction of a number of exotic animals in varied parts of the world. Outstanding among these accidental introductions has been the reversion of livestock to a feral existence and on all continents various livestock species have occasionally wandered from confinement and taken to a "wild" life. McKnight, Feral Livestock in Anglo-America, University of California Press 1 (1964). Perhaps the hardiest of all the feral exotics is the "wild" burro (Equus asinus), scattered throughout the western states and descendants of domesticated burros which had been prized by early prospectors and explorers. McKnight, op. cit. supra, at 21.

At common law a distinction was drawn between animals "ferae naturae" and animals "domitae naturae" (sometimes also referred to as "mansuetae

naturae"). "Ferae naturae" are animals which by nature are wild or of a wild nature or disposition as distinguished from "domitae naturae" which are naturally tame animals. The distinction with attendant differences in legal consequences is found crystallized in the classical writers as early as the seventeenth century in Pufendorf's Law of Nature and Nations, Bk. IV, ch. 6, § 5, and is carried forward by Blackstone, 2 Blackstone, Commentaries § 391, and Chancellor Kent. Kent sets forth the common law rule that ownership of domesticated animals is an absolute property right whereas ownership of animals ferae naturae is in no individual and thus is held to be in the state in its sovereign capacity in trust for the benefit of its people. 2 Kent, Commentaries § 347. The distinction is carried forward in the American decisions. E.g., *Tamburello* v. *Jaeger,* 249 La. 25, 184 So. 2d 544 (1966); *Yazoo & Mississippi Valley R. Co.* v. *Gordon,* 184 Miss. 885, 186 So. 631 (1939); *People* v. *Delio,* 71 N.Y.S. 2d 145 (1947); *Fields* v. *Wilson,* 186 Ore. 491, 207 P.2d 153 (1949); *Andrews* v. *Smith,* 324 Pa. 455, 188 A. 146 (1936).

This Court has expressly recognized the distinction between domestic and wild animals and the classification of the horse as a domestic animal, with attendant legal consequences. *Congress & Empire Spring Co.* v. *Edgar,* 99 U.S. 645 (1879). In that case, the Supreme Court cited with approval the common law maxim that an owner of a domestic animal, such as an ox or a horse, would not be deemed negligent and thus liable for injury caused by either, absent a pre-existing knowledge of a propensity for viciousness on the part of the animal. 99 U.S. at 654. However, a person who has lawfully reduced to possession a wild animal would be liable for such injury even absent a pre-existing knowledge of the animal's mischievous nature. Wild animals, unlike domestic species, are presumed to be mischievous.

In these circumstances, therefore, it is not fortuitous that state authority over the burros in the instant case was exercised not by the New Mexico Department of Game and Fish but by the New Mexico Livestock Board. And it is for the same reason, viz., that horses and burros are not considered wildlife, that the statutes of other western states vest authority over estrays in state livestock boards, not in the state wildlife agency. E.g., Ariz. Rev. Stat. §§ 24-104, 311, 312 (1956) (authority vested in Livestock Sanitary Board); Calif. Food & Agric. Code §§ 35, 16302, 16303, 17091 *et seq.* (1968) (authority vested in Department of Food and Agriculture); Rev. Codes of Montana, Title 46-1001, 1005 (1947) (authority vested in livestock commissions); Nevada Rev. Stat. §§ 569.005, 569.010 (1973) (authority vested in State Department of Agriculture); Oregon Rev. Stat. §§ 607.005, 607.304 (1974 ed.) (authority vested in State Department of Agriculture); Utah Code Ann. §§ 47-2-1, 47-2-5 (1953) (authority vested in Boards of County Commissioners); Wyoming Stat. §§ 11-319, 500 (Cum. Supp., 1975) (authority vested in Wyoming Livestock Board). Much as the statutes cited above, the New Mexico statute defines "estray" as:

> Any bovine animals, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found . . . or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an "estray". . . .

New Mexico Stat. Ann. § 47-14-1 (1953). From the foregoing it is evident that state agencies established to manage and protect wildlife do not exercise authority over estrays for the simple reason that such animals are not ferae naturae. Nor is the distinction one without a difference. Authority of the state over wildlife rests on a dual basis: ownership in trust and police power. *Geer* v. *Connecticut,* supra, *New Mexico State Game Comm'n* v. *Udall,* supra; *United States* v. *Plott,* 345 F. Supp. 1229 (S.D.N.Y. 1972); *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060 (D.Md. 1972). By contrast, state authority over estrays stems solely from police power. *King* v. *Arlington County,* 195 Va. 1084, 81 S.E.2d 587 (1954). As stated by Mr. Justice Brandeis in *Omaechevarria* v. *Idaho,* 246 U.S. 343, 346 (1918): "The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject." Accordingly, the wildlife decisions relied upon by the District Court are inapposite to resolution of the instant case.

B. Provisions of the Wild Free-Roaming Horses and Burros Act Plainly Demonstrate that Horses and Burros Are Not Wildlife

Section 5 of the Act provides that "a person claiming ownership of a horse or burro on the public lands shall be entitled to recover it only if recovery is permissible under the branding and estray laws of the State in which the animal is found." 16 U.S.C. § 1335. In incorporating applicable state laws by reference it is noteworthy that Congress in section 5 refers to "branding and estray laws" rather than to "State fish and wildlife laws." Further, the provisions of section 5 of the Act relating to persons claiming ownership of horses or burros are clearly consistent with the concept of absolute property rights which an individual may possess in animals "domitae naturae" and equally inconsistent with the common law doctrine of animals "ferae naturae" which holds that wildlife is not the object of private ownership. *Geer* v. *Connecticut,* 161 U.S. at 527-29; *State ex rel. Sofeico* v. *Heffernan,* 41 N.M. 219, 67 P.2d 240 (1937).

Moreover, the legislative history of the Act leaves no doubt that Congress was well aware that "wild" horses and burros are in fact feral animals and not wildlife. Commenting on the object of the bill's protection, Representative Gude, chief sponsor of H.R. 795, one of several bills ultimately subsumed in the legislation that emerged, noted, ". . . [T]hese horses originally were escaped horses. They are not wild horses as such, they are really escaped animals." *Hearings on H.R. 795, H.R. 5375 and Related Bills Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. at 21 (1971) (hereinafter "Hearings"). Similarly, Edward P. Cliff, Chief, Forest Service, United States Department of Agriculture, articulated the point in his testimony before the House. "They [free-roaming horses] are not a species of wild animal in the true sense, but generally are domestic livestock which have become feral as a result of being abandoned or turned out on the range." *Hearings* at 63.

In an effort to emphasize this critical distinction, Representative Aspinall, Chairman of the Committee on Interior and Insular Affairs, initiated the following exchange with Boyd L. Rasmussen, Director of the

Bureau of Land Management, United States Department of the Interior, during the course of hearings:

> Mr. Aspinall. Can you tell us whether the free-roaming horses and burros qualify as wildlife and, if not, why not?
>
> Mr. Rasmussen. We do not believe they qualify as wildlife. I think the wildlife definitions say "animals that cannot be domesticated." I am sure horses can be domesticated. In the various States I do not know of any State where the game commissioner claims the animals as wildlife. They are handled by the various agencies that have to do with the domestic livestock. So we do not classify them, and I do not believe they are classified as wildlife.
>
> * * *
>
> Mr. Aspinall. Can wild horses be placed upon the endangered animal list?
>
> Mr. Rasmussen. No, they couldn't because the act that describes the endangered species requires them to be wildlife.

Hearings at 35. Section 3(a) of the Act requires that management activities be carried out "in consultation with the wildlife agency of the State wherein such lands are located," but the provision for consultation was inserted not because the subject horses and burros are wildlife but because of their competition with and impact upon wildlife. Thus, Representative Roncalio noted that:

> . . . [a] protective wild horse policy is needed, and it is needed now. Today wild horses and burros must compete with big game and domestic livestock for the limited grasses in the Western states' arid lands. This has led to serious damage to the soil, vegetation and watershed resources of the lands . . . . *Hearings* at 13.

Mr. Cliff, in his testimony, similarly underscored the interdependence of these various resources:

> Careful management of these animals [horses and burros] is essential for several reasons. The well-being of the animals themselves is important, but the watershed, range, wildlife, and other resources must be fully considered when land management decisions are made. Much of the range where horses and burros are now found is marginal and can support only very limited use. If horses and burro populations increase, other animals will have to be reduced . . . . *Hearings* at 63.

In summary, both the provisions of the Act as well as its legislative history demonstrate plainly that Congress did not look upon wild horses and burros as wildlife.

C. The Proprietary Interest of the United States Is an Adequate Basis of Authority To Protect Burros Found on the Public Domain

The instant case involves burros found on the public domain. It does not involve an assertion of federal authority with respect to burros at one time found on the public domain but found elsewhere at the operative moment. Amicus submits that congressional power to deal with the instant situation springs from the Property Clause which empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U. S. Const., art. IV, sec. 3, cl. 2. The United States may gain a proprietary interest in land within a state and, in the exercise of such interest, the United States as a sovereign possesses power to protect the land as well as articles found thereon by the enactment of reasonable and appropriate ("needful") legislation. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389

(1917). The proprietary control which the federal government may exercise where primary jurisdiction remains in the state is, of course, limited to powers which are reasonably related to the protection and use of its land. "As such, it is generally cognate with the control which any private landowner may exercise over the use of his own land, the chief difference being simply that the United States is constitutionally authorized to enforce its control in the Federal courts, whereas a private landowner is generally limited to the State courts." Natchez Trace Parkway, 58 I.D. 467, 472 (1943) (opinion of Gardner, Solicitor). In other words, the United States, like any landowner, may condition public access to its land. However, unlike the ordinary landowner who is limited to state courts through an appropriate action such as trespass to vindicate conditions of access, Congress by virtue of the Property Clause may establish reasonable and appropriate ("needful") conditions in law and enforce violations thereof through the federal courts. While this Court has clearly stated that the Property Clause "does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits," *Kansas* v. *Colorado,* 206 U.S. 46, 89 (1907), exercise of power under the Property Clause by the United States has been held to be permissible "so long as such power is directed solely to its own protection." *Camfield* v. *United States,* 167 U.S. 518, 526 (1897).

Amicus submits that the proprietary interest of the United States provides adequate authority for the protection of burros found on public lands. It is unnecessary to look beyond the Property Clause to the

Commerce Clause for such power for the reasons that the latter power was not invoked by Congress and, more importantly, the subject matter is plainly of a local nature.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be reversed.

Respectfully submitted,

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